A

Sivananthan a/l Krishnan v Jade Homes Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02 (C)(W)-2184–10 OF 2017
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
27 FEBRUARY 2019

C *Evidence — Expert evidence — Conflicting expert testimony — Trial judge wholly accepted evidence of defendant's expert and rejected that of plaintiff's expert without giving reasons for her preference — Whether trial judge's failure to undertake critical evaluation of the conflicting expert testimonies led her to make a perverse decision in the suit — Whether words contained in condition imposed by* D *local authority for construction of a reinforced concrete wall were simple and straightforward — Whether trial judge misinterpreted the condition by requiring extra words to be read into it*

E After buying a new house ('the property') from the respondent housing developer, the appellant discovered that the respondent had not built a reinforced concrete wall ('RC wall') on the slope between his property and his neighbour's as required under condition 8 of the approved building plan and/or development order approved by the local authority ('MPKj'). Condition 8 required a RC wall to be built if the difference in height between F the platform levels of the appellant's lot and the neighbouring lot exceeded 1,200mm. Instead of a RC wall, the respondent had built a sloping rubble wall. In his suit against the respondent for various reliefs, the appellant pleaded that the respondent's failure to build the RC wall not only breached the development order but also its own written undertaking to MPKj that it would G build the RC wall and comply with all conditions stated by MPKj in the approved infrastructure plan. The appellant claimed the failure to construct the RC wall had damaged his property because water and sediment flowed into his property via the sloping rubble wall every time it rained. In its defence (and counterclaim for general damages), the respondent interpreted condition 8 to H mean that a RC wall was only required if there was an abrupt vertical drop in height of more than 1,200mm between the appellant's property and his neighbour's and since there was no such drop, a rubble wall was adequate. At the trial, both sides relied upon expert evidence of civil engineers to support their respective cases — the respondent's expert was DW5 while the appellant's I was PW2. The trial court accepted the respondent's evidence as more probable than the appellant's and dismissed both the claim and the counterclaim — the latter for lack of proof of actual loss. In his instant appeal, the appellant contended that the High Court's decision was plainly wrong because not only PW2 but also the respondent's architect, DW6, had testified that the difference

between the platform levels of the appellant's property and the neighbouring lot was 3,500mm while MPKj in its letter had stated the difference to be 3,750mm.

Held, unanimously allowing the appeal, setting aside the trial court's decision and ordering general damages to be assessed by the High Court judge:

(1) Based on all the contemporaneous evidence, both oral and documentary, an RC wall had to be built instead of a rubble wall in view of the undisputed height difference of more than 1,200m. The appellant was entitled to require the respondent to deliver the property under the sale and purchase agreement according to the approval of MPKj (see para 46).

(2) Whilst the grounds of judgment of the trial judge contained a summary of the evidence of both PW2 and DW5, the judge failed to conduct a critical evaluation of the conflicting evidence, of which there were many, of the two experts. The trial judge accepted wholly the evidence of DW5 for reasons only known to her. Any acceptance or rejection of one version over the other must be based on a proper evaluation, detailed analysis and weighing of the entire body of evidence of both the experts. Without doing so, the trial judge made a finding that there was no necessity for the respondent to build the RC wall as required by condition 8. Had the trial judge evaluated the competing views of the experts, she would have found that there was reason to discount DW5's opinion (see para 42).

(3) The trial judge erred in holding that the interpretation of condition 8 '... requires the addition of the word 'adjacent". She concluded that condition 8 referred to a wall to address the difference in levels and that the meaning of platform meant two adjacent platforms. This court agreed with PW2's view that the words used in condition 8 were simple and straightforward, ie, that if the level between the two platforms was larger than 1,200mm, a RC wall must be built. It was neither stated nor specified under condition 8 that it only applied to adjacent platforms as suggested by DW5 and DW6. DW7, who was the superintending officer for the project, confirmed in his oral evidence that the level difference between the appellant's property and the back of his neighbour's property exceeded 1,200mm. The wall was not only to ensure structural integrity between the two properties but the safety of the occupiers as well. Even assuming that condition 8 was vague and applied to adjacent platforms, as suggested by DW5, the respondent did not seek any clarification from MPKj but instead chose to interpret condition 8 according to its own considerations and ignored completely the conditions imposed by MPKj. The evidence showed that the respondent's considerations were essentially cost-driven (see para 44).

(4) Condition 8 and the plans dated 24 December 2010 and 7 October 2010 as well as the respondent's letter of undertaking to MPKj together with

A the certificate of completion and compliance had to be read together. By its letter of undertaking dated 3 May 2013, issued after the approval and after MPKj confirmed that the height difference between the appellant's property and his neighbour's was 3,750mm, the respondent undertook to be fully responsible in respect of the design and construction of the slope and to comply with all conditions imposed by MPKj (see para 45).

B

[Bahasa Malaysia summary

Selepas membeli rumah baru ('hartanah') daripada responden pemaju perumahan, perayu mendapati bahawa responden tidak membina tembok konkrit bertetulang ('tembok RC') di lereng antara hartanah dan jirannya seperti yang dikehendaki di bawah syarat 8 pelan bangunan yang diluluskan dan/atau perintah pembangunan yang diluluskan oleh pihak berkuasa tempatan ('MPKj'). Syarat 8 memerlukan tembok RC dibina jika perbezaan ketinggian di antara peringkat platform perayu dan lot jiran melebihi 1,200mm. Sebagai ganti tembok RC, responden telah membina tembok runtuhan cerun. Dalam guamannya terhadap responden untuk pelbagai relif, perayu mengaku bahawa kegagalan responden untuk membina tembok RC bukan sahaja melanggar perintah pembangunan tetapi juga akujanji bertulis sendiri kepada MPKj bahawa ia akan membina tembok RC dan mematuhi semua syarat yang dinyatakan oleh MPKj dalam pelan infrastruktur yang diluluskan. Perayu mendakwa kegagalan untuk membina tembok RC telah merosakkan hartanahnya kerana air dan sedimen mengalir ke dalam hartanahnya melalui tembok runtuhan cerun setiap kali hujan. Dalam pembelaannya (dan tuntutan balas untuk ganti rugi umum), responden menafsirkan syarat 8 bermaksud bahawa Tembok RW hanya diperlukan sekiranya terdapat kejatuhan menegak yang mendadak lebih dari 1,200mm antara hartanah perayu dan jirannya dan oleh kerana tiada kejatuhan tersebut, tembok runtuhan adalah mencukupi. Pada perbicaraan, kedua-dua pihak bergantung kepada keterangan pakar jurutera awam untuk menyokong kes masing-masing — pakar responden adalah DW5 manakala perayu adalah PW2. Mahkamah bicara menerima keterangan responden sebagai lebih mungkin daripada perayu dan menolak kedua-dua tuntutan dan tuntutan balas — yang kemudiannya kerana kekurangan bukti kehilangan sebenar. Dalam rayuannya ini, perayu berpendapat bahawa keputusan Mahkamah Tinggi adalah jelas salah kerana bukan sahaja PW2 tetapi juga arkitek responden, DW6, telah memberi keterangan bahawa perbezaan antara tahap platform hartanah rayuan dan lot jiran adalah 3,500mm manakala MPKj dalam suratnya telah menyatakan perbezaannya adalah 3,750mm.

C D E F G H I

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan mahkamah bicara dan memerintahkan ganti rugi am yang akan dinilai oleh hakim Mahkamah Tinggi:

(1) Berdasarkan semua keterangan kontemporari, kedua-dua lisan dan

dokumentari, tembok RC perlu dibina bukannya tembok runtuhan memandangkan perbezaan ketinggian yang tidak dibantah lebih daripada 1,200m. Perayu berhak untuk menghendaki responden menyerahkan hartanah tersebut di bawah perjanjian jual beli mengikut kelulusan MPKj (lihat perenggan 46).

(2) Walaupun alasan penghakiman hakim bicara mengandungi ringkasan keterangan PW2 dan DW5, hakim gagal melakukan penilaian kritikal terhadap keterangan bertentangan, di mana terdapat banyak, daripada dua pakar. Hakim bicara menerima sepenuhnya keterangan DW5 atas alasan yang hanya diketahui olehnya. Sebarang penerimaan atau penolakan satu versi ke atas yang lain mestilah berasaskan kepada penilaian yang betul, analisis terperinci dan penaksiran seluruh keterangan bagi kedua-dua pakar. Tanpa berbuat demikian, hakim bicara membuat keputusan bahawa tiada keperluan bagi responden untuk membina tembok RC sebagaimana yang dikehendaki oleh Syarat 8. Sekiranya hakim bicara menilai pandangan berlawanan pakar-pakar, beliau akan mendapati ada sebab untuk menolak pendapat DW5 (lihat perenggan 42).

(3) Hakim bicara terkhilaf memutuskan bahawa tafsiran syarat 8 '... memerlukan penambahan perkataan 'bersebelahan'.' Beliau menyimpulkan bahawa syarat 8 merujuk kepada tembok untuk menangani perbezaan tahap dan bahawa makna platform bermakna dua platform bersebelahan. Mahkamah ini bersetuju dengan pandangan PW2 bahawa kata-kata yang digunakan dalam syarat 8 adalah mudah dan jelas, iaitu, jika tahap antara kedua-dua platform adalah lebih besar daripada 1,200mm, tembok RC mesti dibina. Ia tidak dinyatakan atau ditentukan di bawah syarat 8 bahawa ia hanya digunakan pada platform bersebelahan seperti yang dicadangkan oleh DW5 dan DW6. DW7, yang merupakan pegawai pengawasan bagi projek tersebut, mengesahkan dengan keterangan lisannya bahawa perbezaan antara hartanah perayu dan bahagian belakang hartanah jirannya melebihi 1,200mm. Tembok tersebut bukan sahaja untuk memastikan integriti struktur antara kedua-dua hartanah tersebut tetapi juga keselamatan penduduk. Walaupun dengan anggapan bahawa syarat 8 adalah samar-samar dan digunakan untuk platform bersebelahan, sebagaimana yang dicadangkan oleh DW5, responden tidak mendapatkan sebarang penjelasan daripada MPKj tetapi memilih untuk mentafsir syarat 8 mengikut pertimbangannya sendiri dan tidak menghiraukan sepenuhnya syarat-syarat yang dikenakan oleh MPKj. Keterangan menunjukkan bahawa pertimbangan responden pada dasarnya didorong oleh kos (lihat perenggan 44).

(4) Syarat 8 dan pelan bertarikh 24 Disember 2010 dan 7 Oktober 2010 serta surat akujanji responden kepada MPKj bersama-sama dengan sijil

penyelesaian dan pematuhan harus dibaca bersama. Dengan surat akujanji bertarikh 3 Mei 2013, yang dikeluarkan selepas kelulusan dan selepas MPKj mengesahkan bahawa perbezaan ketinggian antara hartanah perayu dan jirannya ialah 3,750mm, responden mengambil tanggungjawab sepenuhnya berkenaan dengan reka bentuk dan pembinaan cerun dan mematuhi semua syarat yang dikenakan oleh MPKj (lihat perenggan 45).]

Notes

For a case on conflicting expert testimony, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1941.

Cases referred to

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)

Jitweer Singh a/l Ojagar Singh v Public Prosecutor [2016] 4 MLJ 525; [2017] 2 CLJ 56, CA (refd)

Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors [2013] 2 MLJ 605; [2013] 2 CLJ 717, FC (refd)

Murarilal v State of MP [1980] AIR SC 531, SC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989

Appeal from: Civil Suit No BA-22C-6–02 of 2016 (High Court, Shah Alam)

Sri Dev Nair (Ramesh Kanapathy and Shamalah Selvarajah with him) (Bodipalar Ponnudurai De Silva) for the appellant.

Ng Siau Sun (Michele Kaur with him) (Sun and Michele) for the respondent.

Hasnah Hashim JCA:

[1] The appeal before us was against the decision of the learned judge in the Shah Alam High Court dismissing the appellant's claim against the respondent and the respondent's counter claim against the appellant. We had, after perusing the records of appeal and after considering the written and oral submissions of learned counsel for the appellant and the respondent, unanimously allowed the appeal with costs. The order of the High Court was set aside. We further ordered that the deposit be refunded. We now give our reasons for allowing the appeal.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

BACKGROUND FACTS

[3] By a sale and purchase agreement dated 9 March 2012 ('the SPA') the plaintiff and his son, Kinagabran a/l Sivananthan purchased 2 1/2 storey Quad Villa held under HS(D) 156356 PT75801 Pekan Kajang with the address known as No 6, Jalan Jade Hills 10/2, Jade Hills, 43000 Kajang, Selangor ('the property'). The plaintiff purchased the property from the respondent, the developer of the housing development known as Jade Hills.

[4] The plaintiff took possession of the property on 29 June 2013 but could not physically occupy the property due to material defects in the construction of the property. The plaintiff sought the defendant's assistance to rectify the defects. Despite numerous letters and meetings between the parties, the defendant failed and/or refused to rectify the defects.

[5] The plaintiff contended that the defendant failed and/or neglected to build a 'reinforced concrete wall' ('RC wall') as required under condition 8 Annexure F ('condition 8') of the approved building plan/development order ('DO') dated 24 October 2010 (see: pp 1–11 core bundle of document ('CBD') Vol 1). It is contended by the plaintiff that instead of constructing the RC wall the defendant had constructed a three rubble wall to protect the stability of the adjoining property. It is the plaintiff's pleaded case that the defendant failed and/or neglected to comply with the DO and their own undertaking to construct the RC wall on the slope of the property. The failure of the defendant to construct the RC wall had caused damage and hardship to the plaintiff and his family. Water and sediment flows into the plaintiff's property every time it rains due to the rubble wall. The plaintiff and his family are deprived of the full use and enjoyment of the property, especially the wet kitchen area.

[6] The plaintiff in the amended statement of claim stated that despite numerous inquiries no confirmation was ever given by the defendant whether the RC wall will be constructed in accordance with the requirements of the DO. The defendant failed and/or neglected to comply with the DO to construct the RC wall and failed and/or neglected to issue the certificate of completion and compliance ('CCC') for the RK-D(i) type unit which was sold to the plaintiff as per the terms and conditions of the SPA.

[7] The reliefs sought by the plaintiff, inter alia, are as follows:

(a) a declaration that the construction of the rubble wall without a supporting RC wall by the defendant has encroached upon the plaintiff's land and prevented the plaintiff from enjoying full usage of the land on the property;

(b) a declaration that the construction of the property and the rubble wall constructed by the defendant was not in accordance with the approved building plan and/or DO that was approved by the Majlis Perbandaran Kajang (MPKj);

(c) an order that the defendant removes the existing rubble wall and slope on the plaintiff's property and further constructs a RC wall on the property for the full height of the slope within three months of the order of the court;

(d) in the alternative, an order that the defendant constructs and builds the RC wall in accordance with the approved building plan and/or DO and/or any undertaking given by the defendant to the MPK; and

(e) general damages to be assessed for the damage and inconvenience caused.

[8] The defendant denied that it did not comply with the approved building plan and/or DO and contended that it had complied with all the applicable conditions attached to the approved building plans. The requirement of a RC wall as required under condition 8 applies only to an immediate vertical drop exceeding 1,200mm. Since there is no immediate vertical drop between the slope at the property and the neighbouring lot the defendant is under no obligation to construct the RC wall. The use of the rubble wall was in accordance with the approved building plans.

[9] Following the plaintiff's complaint the defendant, on a goodwill basis, took steps to redirect the water flow on the slope in January and February 2014 to prevent any seepage or flowing water or sediments from the slope into the wet kitchen and the yard. It is claimed that the rubble wall does not pose any danger or safety issue to the plaintiff as occupant of the property.

[10] It is contended by the defendant that the plaintiff's complaint is baseless and a sham with the ulterior intention to compel the defendant to bear the costs and risk beyond the ambit of the agreed terms under the SPA. The claim by the plaintiff is an abuse of process and has caused the defendant loss and damages. The defendant filed a counterclaim against the plaintiff for general damages.

FINDINGS OF THE HIGH COURT

[11] The matter went on for full trial and the main issue tried before the High Court was essentially whether there was a breach of condition 8 by the defendant for failing to construct the RC wall. Having heard the evidence of the witnesses and having considered the documents that were tendered in court, the learned judge accepted the evidence of the defendant as being more probable than the evidence of the plaintiff.

[12] The findings of the learned judge in her grounds of judgment can be summarised as follows:

(a) on *condition 8*: The interpretation of condition 8 by the defendant was accepted. To hold otherwise would lead to a situation where approved building plans would be negated. The defendant must comply with the approved building plans and any variation must be with the approval of MPKj, in this case there was none;

(b) on the *letter of undertaking*: Accepted the evidence of DW4 that this was a standard letter required by MPKj for all projects during and after the application of CCC;

(c) on *s 44 of the National Land Code and lateral support*: Since condition 8 did not apply to the affected slope, the rubble wall remains. There is no issue of lateral support; and

(d) on the *counterclaim:* The defendant failed to prove the actual loss suffered.

SUBMISSION OF PARTIES

[13] In essence, the plaintiff's main argument is that the learned judge erred when she found that the plaintiff can only rely on the building plan approved by MPKj through the letter dated 24 December 2010 which was essentially an application for approval of a building plan. The said letter expressly stated that the approval of the building plan is subject to compliance to the conditions. Condition 8 specifically requires the construction of the RC wall where the platform level difference exceeds 1,200mm. As long as the platform level difference exceeds 1,200mm RC wall must be constructed. Learned counsel for the plaintiff submitted that condition 8 only mentioned 'platform' and the learned judge was wrong to import words into condition 8 when there is no necessity to do so.

[14] Learned counsel for the plaintiff argued that it was not safe to rely on the defendant's report prepared by the defendant's expert, Ir Tu Yong Eng ('DW5'). DW5 prepared the report without conducting any visual or physical inspection of the property, in particular the affected area. DW5 prepared his report relying totally on information given by his client, the defendant. The learned judge had not only relied on DW5's expert report but also the evidence of the defendant's architect, John Lau Kah Sieng ('DW6') on the interpretation and application of condition 8. DW6 had admitted in evidence that one of the reasons the defendant constructed the rubble wall instead of RC wall was essentially to save costs. The same witness also confirmed that the height of the platform is 3.5 metres which is higher than 1,200mm.

[15] On the other hand, the plaintiff's own expert witness, Spencer Klumai ('PW2'), had conducted a site inspection of the property and in particular the affected area. PW2 concluded that based on the building plans the defendant had failed to comply with the requirement of condition 8 as the difference between the platform level of the plaintiff's lot and that of the neighbouring lot is 3,500mm. Therefore, in compliance with condition 8 a RC Wall should have been built by the defendant. By a letter dated 11 may 2015 MPKj confirmed that the height of the platform of the two lots is 3,750mm. The construction of the rubble wall instead of an RC wall had caused damage to the plaintiff's property.

[16] It was argued by learned counsel for the plaintiff that there must be strict compliance by the defendant of condition 8 and that there can be no waiver of that condition as the SPA executed between the parties are as prescribed under the Housing Development (Control and Licensing) Act 1966 and Housing Development (Control and Licensing) Regulations 1989.

[17] Learned counsel for the plaintiff further argued that the learned judge had not given due weight to the letter of undertaking dated 3 May 2013 issued by the defendant to MPKj. By the letter of undertaking the defendant undertook to be fully responsible in respect of the design and construction of the slope and RC wall and to comply to with all the conditions laid down by MPKj.

[18] In opposing the appeal, learned counsel for the defendant argued that there was no breach of condition 8, the slope and the rubble wall were approved by MPKj and was in accordance with the terms of the SPA. Condition 8 cannot be read in isolation but must be read together with the approved plans. The former Pengarah of Jabatan Kawalan Bangunan MPKj ('DW7') testified that condition 8 applied only to the structure of the property and not to the area outside the property.

Our decision

[19] As stated at the outset of this judgment, we had after hearing submissions from counsel decided unanimously to allow this appeal with costs. The main issue in this appeal is the interpretation of condition 8 of the approval letter dated 24 December 2010 issued by MPKj and, whether the defendant breached condition 8. The learned judge found affirmatively for the defendant when she held that:

> 24. Although the interpretation requires the addition of the word 'adjacent', the interpretation as offered by Plaintiff similarly requires words to be added, namely 'boundary' and 'retaining' to qualify RC wall.

25. Further if 2 platforms are adjacent to each other the different level can readily be measured. Where platforms are apart there are many ways an engineer can design to cater for the difference as part of the architectural design and here it was addressed by a slope and rubble wall. As condition 8 refers to a wall to address the difference in levels the meaning of platform would mean 2 adjacent platforms.

[20] The defendant's interpretation of condition 8, accepted by the judge, is this, condition 8 only applies to an immediate vertical drop exceeding 1,200 mm of which there was none in this case. The learned judge accepted the explanation of DW5 in his report that the immediate vertical drop and adjacent platform is the same. DW5 was of the opinion that condition 8 itself is vague therefore the circumstances of the project must be examined. If the two platforms are immediately adjacent to each other the different level can be readily measured. In this project, however, in order to address the difference in levels of the neighbouring lots the design was to use a slope and rubble wall. Condition 8 refers to the construction of an RC wall to address the difference in levels, thus DW5 concluded the platform must refer to the two platforms immediately adjacent to each other.

[21] Learned counsel further argued that if there was such a requirement to build an RC Wall by MPKj then, MPKj would have expressly indicated on the building plans submitted by the defendant and would not have approved the said building plans. Condition 8 is not a comment neither is it a requirement to amend and/or change the building plans.

[22] In arriving at our decision we have examined and considered all the relevant documents. We agreed with the submission of learned counsel for the defendant that condition 8 cannot be considered in isolation of the documents relevant to the approved buildings plans and related correspondences.

[23] The letter of approval of the building plans submitted by the defendant through its architect, Arkitek KDI Sdn Bhd, had stated that the approval was subject to the stipulated conditions. One of the conditions is to comply with the conditions of Jabatan Teknikal as attached in *Lampiran*/Annexures A, C, E, F, G and H. Condition 8 *lampiran*/annexures stipulated as follows:

8. Hendaklah mengadakan tapak dinding kontrik bertetulang bagi perbezaan aras platform yang melebihi 1200mm.

Condition 8 simply requires an RC wall to be constructed where there is a platform level difference exceeding 1,200mm. The defendant's own witness, DW6 confirmed that the platform level difference at the affected area is 3.5 meters. The learned judge relied on the evidence of DW5 and accepted the suggestion by DW5 that the intent and application of condition 8 applies only to an immediate vertical drop exceeding 1,200mm. In his report DW5 was of

A the opinion that the language of condition 8 is vague:

> 4.2 The language of condition 8 is vague. If read on its own, it leads to confusion. In interpreting its meaning, we need to look at circumstances of the project.

(See: p 170 CBD Vol 1).

B

[24] DW5 concluded in para 4.6 of his report (see: p 171 CBD Vol 1) as follows:

> The requirement of reinforced concrete wall in condition 8 of Lampiran F is only applicable to the area where retaining wall is needed, and the exposed wall height (ie the height of the common vertical surface) is above 1200mm.

C

[25] DW5 also said that there have been many failures involving rubble walls especially earth retaining walls. Therefore, MPKj made it mandatory that reinforced concrete wall be built if the wall is higher than 1,200mm:

D

> 5.0 Based on my dealings with MPKj,I understand that there have been many failures involving rubble walls especially earth retaining wall. Hence, reinforced concrete wall was made mandatory by MPkj if the wall is higher than 1200mm ...

E (See: p 171 CBD Vol 1).

[26] In respect of the affected area of the plaintiff's property this is what DW5 said in his report:

F

> 7.1 I am informed that there is a rubble wall at the lower end of the slope within the compound.
>
> 7.2 I am also informed by Jade Homes Sdn Bhd that the exposed height of the rubble wall is approximately 900 mm.
>
> 7.3 As its exposed height is less than 1200, condition 8 of Lampiran F does not apply.

G

[27] DW5 prepared his expert report relying purely on the building plan approval dated 24 October 2010, approved drawings and information given by the defendant. DW5 did not conduct any physical inspection of the affected area of the property.

H

[28] The plaintiff's expert, Ir Spencer Klumai ('PW2'), a civil engineer prepared his report dated 21 November 2016 based on the relevant plans, documents and after inspecting the property. In his report, PW2 stated that based on the drawings and the plans the difference in platform level between the plaintiff's property and that of his immediate neighbor is 3,500mm. In PW2's opinion there is a necessity for an RC wall to be built:

I

> Oleh kerana jelas menurut lukisan dan pelan-pelan di atas bahawa perbezaan aras platform untuk rumah En Sivananthan dan rumah jiran di bahagian belakang

adalah 3.5m (yang mana telah melebihi had 1200mm saperti disyaratkan),maka ada keperluan untuk memenuhi syarat membina RC Retaining Wall di sempadan belakang rumah En Sivananthan dan jiran di belakangnya.

[29] PW2 conducted a physical site inspection of the affected area and concluded in his report:

Saya berpendapat bahawa syarat no 8 didalam Lampiran F tidak dipenuhi kerana jika perbezaan aras platform yang dinyatakan didalam syarat tersebut kepada kedudukan ketinggian aras tingkat bawah rumah jiran dan aras tingkat bawah rumah En Sivananthan, kerana jelas disini perbezaan aras platform tersebut adalah 3500mm. Maka, dengan itu, tembok penahanan dari jenis Konkrit Bertetulang (*RC Retaining Wall*) perlu digunakan bagi memenuhi syarat 8 didalam Lampiran F.

[30] PW2 also prepared a report in response to DW5's expert report. The report dated 1 March 2017 was appended together with his witness statement. In response to DW5's opinion that condition 8 is vague, PW2 explained:

Syarat 8 Lampiran F adalah jelas dan tiada apa-apa meragukan. Ianya sudah jelas menyatakan 'Hendaklah mengadakan tapak dinding kontrik bertetulang bagi perbezaan aras platform yang melebihi 1200mm'. Perbezaan aras platform yang dirujuk disini bermaksud ketinggian diantara dua platform muktamad yang disediakn oleh pemaju.

Dalam kes ini ianya merujuk kepada perbezaan aras platform lot rumah Plaintif dan aras platform lot rumah jiran di belakang. Perbezaan aras platform didalam kes ini tidak boleh dirujuk sebagai perbezaan aras bermula diatas tembok rubble wall yang dibinakan kawasan rumah Plaintif dan dibandingkan pula satu lagi aras platform dalam kawasan rumah Plaintif.

[31] PW2 opined that since the difference in the platform level between the neighbouring lot behind the property is 3,500mm then a RC wall must be constructed:

Perlu ditekankan disini bahawa, keadaan 'siap telah dibina' dengan nyata menunjukkan perbezaan aras platform antara lot rumah jiran dibelakang dan rumah Plaintif adalah lebih kurang 3500mm iaitu melebihi 1200mm. Oleh yang demikian, tembok penahan daripad jenis 'reinforced Concrete Retaining Wall' perlu dibina di sepanjang sempadan belakang dan bukanya sebahagian sahaja.

[32] The learned judge however, preferred the opinion of DW5 and the suggestion that condition 8 applies only to an immediate vertical drop exceeding 1,200mm. She agreed with DW5's view that the conditions in *Lampiran A–H* are general requirements and applicable only if relevant. The purpose of the conditions serves as only a reminder to resolve any ambiguity in the approved plans and not meant to contradict the approved plans (see: para 18 of the grounds of judgment).

[33] Prior to the issuance of the letter approving the plans vide letter dated 24 December 2010, MKKj had issued a letter dated *7 October 2010* that the plans submitted has been approved but with the condition that the Defendant was to complying with the conditions as set down in the prior approved infrastructure and additional conditions — '... *DILULUSKAN* dengan syarat perlu mematuhi syarat-syarat pada kelulusan infrastruktur terdahulu dan syarat-syarat tambahan ...':

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FAKS : +603-8737 7897, +603-8733 1270
HOTLINE : +603-8736 8017, +603-8733 5743

DITERIMA
JAM: 9.35 AM/PM
04 JUL 2016
JABATAN UNDANG-UNDANG
MAJLIS PERBANDARAN KAJANG

SIRIM
CERTIFIED TO MS ISO 9001:2008

Rujukan Kami: MPKJ/BC/INF/1/27-2010
( )dlm. MPKJ 25/INF/K/2001 JILID II
Tarikh: 07 hb Oktober 2010

Tetuan G & P Professional Sdn. Bhd.
Wisma G & P,
39-5, Jalan 3/146,
Bandar Tasik Selatan,
57000 Kuala Lumpur.

JADE HOMES SDN BHD
RECEIVED
08 OCT 2010
Project Mgmt. Dept.

Tuan,

CADANGAN PEMBANGUNAN BERCAMPUR DI ATAS LOT 1981, 1983, 1984, 2631, 2632, 2857, 2858, 3932, 5261, 5263, 7459-7476, 7493-7508, 8617 & 8624 (RUJ : ( ) 25/INF/K/2001 JLD 1) DAN DI ATAS LOT 919, 1531, 8620, 8621 & 8624 (RUJ: ( )DLM.MPKJ 25/INF/K/2001, MUKIM KAJANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN UNTUK TETUAN JADE HOMES SDN. BHD.

- **PERMOHONAN KELULUSAN PELAN INFRASTRUKTUR (PINDAAN)**

Dengan hormatnya saya merujuk kepada perkara tersebut diatas .

2. Untuk makluman, permohonan pihak tuan telah dibawa ke Mesyuarat Jawatankuasa Pusat Setempat Bil 12/2010 yang telah bersidang pada 18hb Julai 2010 dan telah **DILULUSKAN** dengan syarat perlu mematuhi syarat-syarat pada kelulusan Infrastruktur terdahulu dan syarat-syarat tambahan seperti berikut :

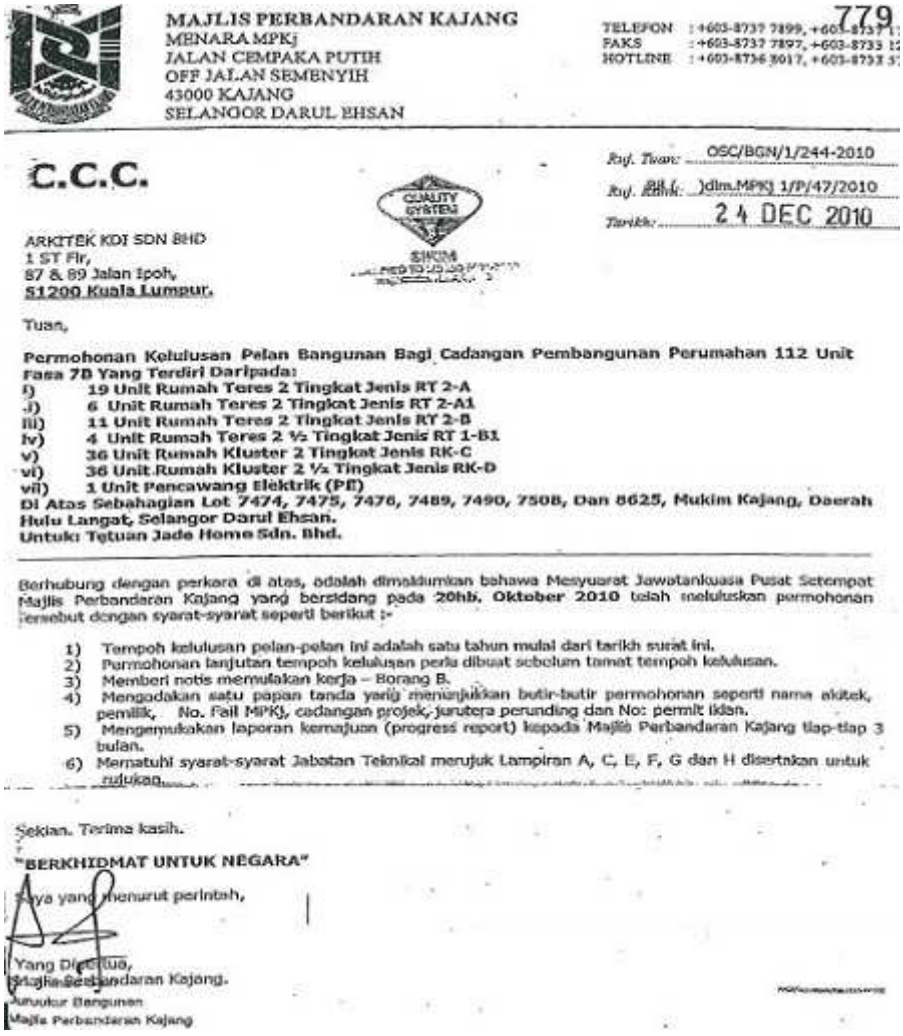
i. Tempoh kelulusan adalah satu tahun mulai dari tarikh surat ini.
ii. Memohon melanjutkan tempoh kelulusan jika tidak dapat memulakan kerja-kerja pembinaan dalam tempoh yang dihadkan itu.
iii. Syarat-syarat AM seperti dalam Lampiran A.
iv. Syarat-syarat JPS seperti dalam Lampiran B.
v. Surat pengakuan daripada Jurutera Perunding bahawa segala syarat-syarat yang dikenakan akan dipatuhi.
vi. Mengutamakan penggunaan pekerja-pekerja tempatan dalam projek pembangunan yang diluluskan.

3.) Kerja tanah tidak boleh dijalankan pada musim/waktu hujan. Notis memulakan kerja tanah hendaklah dikemukakan bersama-sama laporan ramalan kaji cuaca dan ulasan daripada Jabatan Meteorologi Malaysia.

- 56 -pindaanjan2010

[34] This was followed by MPKj's letter dated *24 December 2010* informing the defendant that the building plans were approved subject to conditions,

inter alia, complying with the conditions imposed by the technical department as indicated in Appendix A–H:



MAJLIS PERBANDARAN KAJANG
MENARA MPKj
JALAN CEMPAKA PUTIH
OFF JALAN SEMENYIH
43000 KAJANG
SELANGOR DARUL EHSAN

779

TELEFON : +603-8737 7899, +603-8737 1
FAKS : +603-8737 7897, +603-8733 1
HOTLINE : +603-8736 3017, +603-8733 3

C.C.C.

Rujukan Tuan: OSC/BGN/1/244-2010
Rujukan Kami:)dlm.MPKj 1/P/47/2010
Tarikh: 24 DEC 2010

ARKITEK KDI SDN BHD
1 ST Flr,
87 & 89 Jalan Ipoh,
51200 Kuala Lumpur.

Tuan,

Permohonan Kelulusan Pelan Bangunan Bagi Cadangan Pembangunan Perumahan 112 Unit Fasa 7B Yang Terdiri Daripada:

i) 19 Unit Rumah Teres 2 Tingkat Jenis RT 2-A
ii) 6 Unit Rumah Teres 2 Tingkat Jenis RT 2-A1
iii) 11 Unit Rumah Teres 2 Tingkat Jenis RT 2-B
iv) 4 Unit Rumah Teres 2 ½ Tingkat Jenis RT 1-B1
v) 36 Unit Rumah Kluster 2 Tingkat Jenis RK-C
vi) 36 Unit Rumah Kluster 2 ½ Tingkat Jenis RK-D
vii) 1 Unit Pencawang Elektrik (PT)

Di Atas Sebahagian Lot 7474, 7475, 7476, 7489, 7490, 7508, Dan 8625, Mukim Kajang, Daerah Hulu Langat, Selangor Darul Ehsan.
Untuk: Tetuan Jade Home Sdn. Bhd.

Berhubung dengan perkara di atas, adalah dimaklumkan bahawa Mesyuarat Jawatankuasa Pusat Setempat Majlis Perbandaran Kajang yang bersidang pada **20hb. Oktober 2010** telah meluluskan permohonan tersebut dengan syarat-syarat seperti berikut :-

1) Tempoh kelulusan pelan-pelan ini adalah satu tahun mulai dari tarikh surat ini.
2) Permohonan lanjutan tempoh kelulusan perlu dibuat sebelum tamat tempoh kelulusan.
3) Memberi notis memulakan kerja – Borang B.
4) Mengadakan satu papan tanda yang menunjukkan butir-butir permohonan seperti nama akitek, pemilik, No. Fail MPKj, cadangan projek, jurutera perunding dan No: permit iklan.
5) Mengemukakan laporan kemajuan (progress report) kepada Majlis Perbandaran Kajang tiap-tiap 3 bulan.
6) Mematuhi syarat-syarat Jabatan Teknikal merujuk Lampiran A, C, E, F, G dan H disertakan untuk rujukan.

Sekian. Terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

Yang Dipertua,
Majlis Perbandaran Kajang.
Penyelia Bangunan
Majlis Perbandaran Kajang

[35] The letter of approval had clearly stated that the approval of the building plans is subject to the defendant complying with all the conditions as set out in Appendix A–H. MPKj did not give any option to the defendant to decide and choose which condition they wish to comply with. The approval is subject to the defendant complying with all the conditions imposed by MPKj.

[36] *Lampiran*/Annexure F reads as follows:

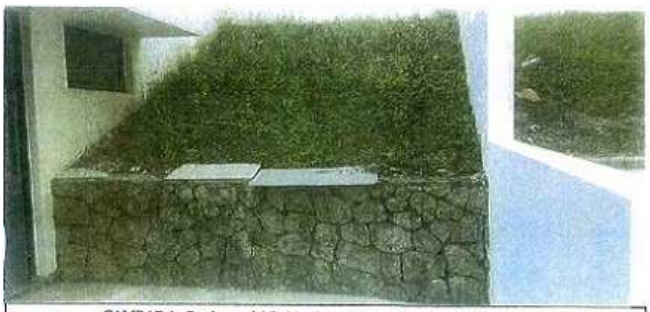
MPKJ 1/P/47/2010

LAMPIRAN F

1. 50% daripada bahan binaan hendaklah menggunakan bahan keluaran tempatan.
2. Permohonan lanjutan tempoh kelulusan perlu dibuat sebelum tamat tempoh kelulusan dan bayaran yang akan dikenakan ialah 50% daripada bayaran proses pelan. Sekiranya permohonan dibuat setelah tempoh kelulusan tamat, bayaran 100% akan dikenakan. Permohonan lanjutan hanya dibenarkan dalam tempoh 5 tahun sahaja.
3. Pelan Penghadang dan papan tanda perlu dikemukakan kepada Majlis sebelum sebarang kerja dimulakan.
4. Kelulusan ini adalah tertakluk kepada syarat-syarat Jabatan-Jabatan Teknikal yang terlibat dalam memberi sokongan.
5. Hendaklah mengadakan "R.C HOOD" di setiap tingkap.
6. Memastikan semua tandas diadakan paip disebelah mangkuk tandas bagi kegunaan pembersihan pengguna.
7. Menyediakan 'two wheel bin'/Tong sampah dengan kapasiti 120 liter bagi setiap unit rumah. (Tertakluk Kepada Jabatan Perkhidmatan Perbandaran & Kesihatan MPKJ).
8. Hendaklah mengadakan tapak dinding konkrit bertetulang bagi perbezaan aras platform yang melebihi 1200 mm.
9. Mendapatkan hakmilik individu sebelum mengemukakan permohonan C.C.C.
10. Pihak pemilik hendaklah memasang Sistem Pengumpulan Dan Penggunaan Semula Air Hujan (SPAH).
11. Mengemukakan satu set pelan struktur sebelum memohon C.C.C.
12. Memastikan pemasangan pagar penghadang (hoarding), papan tanda projek serta membina "wash trough" dan kolam perangkap kelodak di tapak yang akan dibangunkan.
13. Memastikan tangki air diletakkan di atas "r.c.beam".
14. Mengemukakan Borang G2, G3, G6 & G12 kepada pihak Majlis untuk tujuan pemeriksaan tapak.

Sr. Ahmad Sabi
Jurutera Bangunan
Majlis Perbandaran Kajang

[37] In his report PW2 who visited the property took photos to explain why a RC wall should have been built (see: pp 153–154 CBD Vol 1):



GAMBAR 1: Pandangan lebih dekat ke arah cerun di sempadan jiran belakang

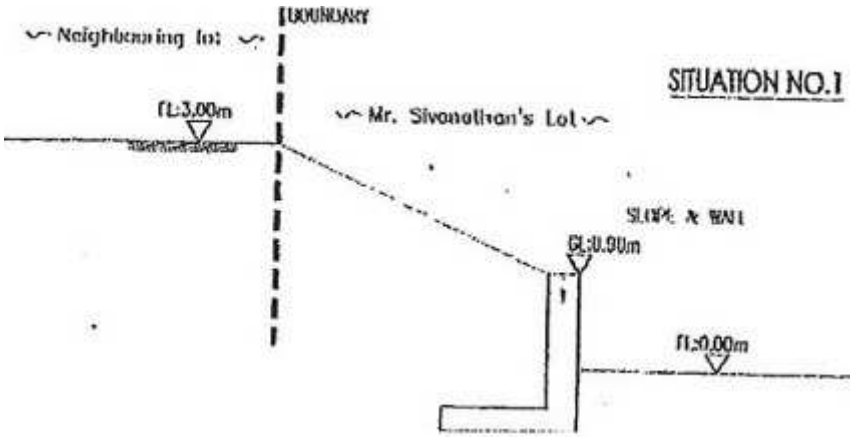
GAMBAR 2:
Pandangan dari arah lebih jauh ke cerun di sempadan jiran belakang

GAMBAR 3:
Pandangan daripada atas (dinding sempadan jiran belakang)

[38] PW2 concluded that since the difference in height of the platform is 3,500mm a RC Wall should have been built by the defendant in compliance with condition 8. He further explained in his report in reply to DW5's report that the difference in the level of the platform means the difference in height between the two platforms built by the defendant:

> Didalam kes ini ianya merujuk kepada perbezaan aras platform lot rumah Plaintiff dan aras platform lot rumah jiran belakang. Perbezaan aras platform dalam kes ini tidak boleh dirujuk sebagai aras bermula diatas tembok rubble wall yang dibinakan kawasan Plaintiff dan dibandingkan satu lagi aras platform dalam kawasan rumah Plaintiff.

(See: p 190 CBD Vol 1).



[39] PW2 in his report prepared a diagram comparing two situations of the plaintiff's affected area. Situation 1 shows the area without RC wall and situation 2 if an RC wall is constructed. He meticulously explained in the report and during cross-examination as well as re-examination that if an RC wall is not constructed the structural integrity of the plaintiff's land is dependent on the neighbor's land and if the plaintiff construct or renovate the said area bordering his neighbor it will affect the structural integrity and stability of his neighbor's land as well as that of the plaintiff's:

> ... Situasi no 1 menunjukkan bahawa kestabilan struktur tanah di sempadan lot rumah jiran bergantung dan boleh di pengaruhi oleh kestabilan struktur tanah didalam lot rumah Plaintif jika diganggu. Oleh itu, Plaintif tidak ada kebebasan untuk mengubahsuai struktur tanah bagi mendapatkan ruang yang lebih baik bagi kegunaan beliau,memandangkan jika tembok penahanan diganggu atau dipindah kedudukannya, ianya boleh memberi kesan pada kestabilan tanah jiran. Walau bagaimanapun,keadaan ini tidak akan berlaku jika keadaan disempadan adalah saperti di Situasi No 2. Di dalam keadaan ini, tembok penahan berada betul-betul di atas sempadan dan Plaintif tidak perlu membuat apa-apa ubahsuai bagi mendapatkan lebih ruang untuk digunakan.
>
> ... Perlu ditekankan disini bahawa, keadaan 'siap telah dibina' dengan nyata menunujukkan perbezaan aras platform antara lot rumah jiran di belakang dan rumah Plaintiff adalah lebih kurang 3500mm lebih melebihi 1200mm. Oleh yang demikian, tembok penahanan daripada jenis 'reinforced Concrete Retaining Wall' perlu dibina di sepanjang sempadan belakang dan bukannya sebahagian sahaja.

(See: p 191 CBD Vol 1).

[40] When confronted by a divergence of expert opinion based upon the same fact (as in this case) it is incumbent upon the judge to weigh and assess carefully the evidence and accept if necessary the most reliable parts in forming its decision (see: *Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors* [2013] 2 MLJ 605; [2013] 2 CLJ 717). In her grounds of judgment the learned judge referred to the evidence of PW2, however, failed to give any reason why she preferred the evidence of the defendant's expert, DW5.

[41] Anuar, CJ Malaya (as he then was) in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153 referred to the Supreme Court of India's decision in *Murarilal v State of MP* [1980] AIR SC 531 at p 534:

> But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the equality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest

mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect ...

[42] Whilst the grounds of judgment contained a summary of the evidence of PW2 and DW5, we are constrained to find that the learned judge erred in failing to conduct critical evaluation of the conflicting evidence, of which there are many, of both the experts. The learned judge accepted wholly the evidence of DW5 for reasons only known to Her Ladyship. However, any acceptance or rejection of one version over the other must be based on a proper evaluation, detailed analysis and weighing of the entire body of evidence of both the experts. Without evaluating the opinions of the experts, the learned judge went on to make a finding that there is no necessity for the defendant to construct the RC wall as required by condition 8. We therefore agreed with learned counsel for the plaintiff that had the learned judge evaluated the competing views, Her Ladyship would have found there to be reason to discount the opinion of DW5.

[43] This court in *Jitweer Singh a/l Ojagar Singh v Public Prosecutor* [2016] 4 MLJ 525; [2017] 2 CLJ 56 observed:

It is trite law that a judge must not consider expert evidence in a vacuum in the sense that the same should not be artificially separated from the rest of the evidence. When there is conflicting opinion, a judge should test it against the background of all the other evidence available in that particular case in order to decide which expert evidence is to be preferred. In particular, a judge must have regard to the direct evidence, whether in the form of oral evidence or contemporaneous documents, and the overall circumstances material to the issue at hand. The version more consistent with these ought to be accepted as being more trustworthy and reliable.

[44] Thus, in our judgment the learned judge erred when she said that the interpretation of condition 8 '... requires the addition of the word 'adjacent'.' Her Ladyship concluded that condition 8 refers to a wall to address the difference in levels and that the meaning of platform would mean two adjacent platforms. We are in agreement with the view expressed by PW2 that the words used in condition 8 is simple and straightforward, that is, if the level between the two platforms is higher than 1,200mm, a RC wall must be built. It is neither stated nor specified under condition 8 that it only applies to adjacent platforms as suggested by DW5 and DW6. DW7 who was the superintending officer for the project confirmed in his oral evidence that the level difference between the property and the back of the neighbor's property exceeded 1,200mm. This is not only to ensure structural integrity between the two properties but the safety of the occupiers as well. Even assuming condition 8 is vague and applies to adjacent platform as suggested by DW5, the defendant did not seek any clarification from MPKj but instead chose to interpret

condition 8 according to their own considerations and ignored completely the conditions imposed by MPKj. And, the evidence showed that the defendant's consideration was essentially costs driven.

[45] Condition 8 and the plans dated 24 December 2010 and 7 October 2010 as well as the letter of undertaking together with the CCC must be read together. By the letter of undertaking dated *3 May 2013*, issued after the approval and after MPKj confirmed that the height of the plaintiff and that of his neighbor's is 3,750mm, the defendant undertook to be fully responsible in respect of the design and construction of the slope and to comply with all conditions imposed by MPKj:

Jade Homes Sdn Bhd 710233-X 790

Property Gallery,
Persiaran Jade Hills Utama,
Jade Hills,
43000 Kajang,
Selangor Darul Ehsan.
Tel : 03 - 8733 8619
Fax : 03 - 8733 6508 (PMD)
03 - 8733 8625 (CMD)

Rujukan: MPKj 25/INF/K/2001 Jld II
Rujukan kami : JH/PMD/Phs7B2/1.01/MPKJ/13/038

SURAT AKU JANJI

NAMA PEMILIK : **JADE HOMES SDN BHD**

ALAMAT SURAT MENYURAT : PROPERTY GALLERY,
PERSIARAN JADE HILLS UTAMA,
JADE HILLS, 43000 KAJANG,
SELANGOR DARUL EHSAN

YANG DIPERTUA
Majlis Perbandaran Kajang
Menara Kajang
Jalan Cempaka Putih,
Off Jalan Semenyih,
43000 Kajang
Selangor Darul Ehsan

Y. Bhg. Dato'/Tuan/Puan,

CADANGAN PEMBANGUNAN PERUMAHAN 112 UNIT FASA 7B YANG TERDIRI DARIPADA:
i.10 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A
ii.6 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A1
iii.11 UNIT RUMAH TERES 2 TINGKAT JENIS RT 1-B
iv.4 UNIT RUMAH TERES 2 ½ TINGKAT JENIS RT 1-B1
v.36 UNIT RUMAH KLUSTER 2 TINGKAT JENIS RK-C
vi.36 UNIT RUMAH KLUSTER 2 ½ TINGKAT JENIS RK-D
vii. 1 UNIT PENCAWANG ELEKTRIK (PE)
DI ATAS SEBAHAGIAN LOT 7474, 7475, 7476, 7489, 7490, 7508, DAN 8625, MUKIM KAJANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN UNTUK TETUAN JADE HOMES SDN. BHD.
(MELIBATKAN 51 UNIT: 11 UNIT RUMAH TERES 2 TINGKAT JENIS RT 1-B, 4 UNIT RUMAH TERES 2 TINGKAT JENIS RT 1-B1, 18 UNIT RUMAH KLUSTER 2 TINGKAT JENIS RK-C, 18 UNIT RUMAH KLUSTER 2 ½ TINGKAT JENIS RK-D DAN KERJA-KERJA INFRASTRUKTUR)
(Jade Hills Fasa 7B2)

Bahawa saya/kami JADE HOMES SDN. BHD. No. Pendaftaran Syarikat: 710233-K dan beralamat di Property Gallery, Persiaran Jade Hills Utama, Jade Hills, 43000 Kajang, Selangor Darul Ehsan adalah pemilik Lot 7474, 7475, 7476, 7489, 7490, 7508, dan 8625 untuk CADANGAN PEMBANGUNAN PERUMAHAN MELIBATKAN 10 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A, 6 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A1, 11 UNIT RUMAH TINGKAT JENIS RT 1-B, 4 UNIT RUMAH TERES 2 ½ TINGKAT JENIS RT 1-B1, 36 UNIT RUMAH KLUSTER 2 TINGKAT JENIS RK-C, 36 UNIT RUMAH KLUSTER 2 ½ TINGKAT TINGKAT JENIS RK-D, DAN 1 UNIT PENCAWANG ELEKTRIK (JADE HILLS FASA 7B2)

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Rujukan: MPKj 25/INF/K/2001 Jld II
Rujukan kami : JH/PMD/Phs7B2/1.01/MPKJ/13/038

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Dengan sesungguhnya mengaku janji bahawa saya/kami akan bertanggungjawab sepenuhnya ke atas rekabentuk dan pembinaan **CERUN (SLOPE)** dan **TEMBOK PENAHAN (REINFORCED CONCRETE WALL)** di atas tanah milik saya/kami yang tersebut di atas serta memaluhi segala peraturan, syarat dan arahan yang ditetapkan oleh Majlis Perbandaran Kajang (MPKj) di dalam surat/pelan MPKj 25/INF/K/2001 Jld II Kelulusan Pelan Infrastruktur bertarikh 7 Oktober 2010 dan/atau apa-apa arahan MPKj dari semasa ke semasa di dalam tempoh yang ditetapkan.

Maka dengan itu, saya/kami berjanji bahawa saya/kami bersetuju melepaskan dan menanggung rugi MPKj daripada segala tuntutan, tindakan, penalty, tuntutan kos, pembayaran, perbelanjaan dan permintaan berkaitan dengan pembinaan **CERUN (SLOPE)** dan **TEMBOK PENAHAN (REINFORCED CONCRETE WALL)** di atas tanah milik saya tersebut.

Sekian, harap maklum

792

(Tandatangan Pemiu/Pemaju)

Nama : Ng Swee Koong
No. K/P : 670633-02-5185
Jawatan : Pengurus Projek
Tarikh :
Cop Rasmi :

(Tandatangan Perunding)

No. K/P : 680911-12-5595
Jawatan : Director
Tarikh :
Cop Rasmi :

G & P PROFESSIONALS SDN. BHD. (622734-W)

(Tandatangan Saksi)

Nama : Wong Wei Kan
No. K/P : 760510-06-5265
Jawatan : Manager
Tarikh :
Cop Rasmi :

(Tandatangan Kontraktor)

No. K/P :
Jawatan :
Tarikh :
Cop Rasmi :

Di Hadapan:
(Disyorkan dari kalangan Pegawai MPKj)

No. K/P :
Jawatan :
Tarikh : 3/5/13
Cop Rasmi :

Muka Surat 3
45

[46] Based on all the contemporaneous evidence, both oral and documentary, we are of the considered view that a RC wall must be built instead of a rubble wall in view of the undisputed height difference of more than 1,200mm. The plaintiff is entitled to require the defendant to deliver the property under the SPA, according to the approval of MPKj.

CONCLUSION

[47] In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention was warranted.

[48] For the foregoing reasons, we unanimously allowed the appeal in particular prayers 25(iii) and (v) of the statement of claim with costs. We set aside the High Court judgment. General damages to be assessed by the High Court judge. As for costs, we awarded a sum of RM100,000 here and below to the appellant to be paid by the respondent subject to payment of allocatur. We also ordered that the deposit be refunded to the appellant.

Order accordingly.

Reported by Ashok Kumar